

are issued, adopted, or promulgated, after July 4, 1967. No “(a) (2)” materials issued, promulgated, or adopted after July 4, 1967, that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be made available upon request if not exempted under this part.

(2) Each DoD Component shall promptly publish quarterly or more frequently, and distribute, by sale or otherwise, copies of each index of “(a)(2)” materials or supplements thereto unless it publishes in the FEDERAL REGISTER an order containing a determination that publication is unnecessary and impracticable. A copy of each index or supplement not published shall be provided to a requester at a cost not to exceed the direct cost of duplication as set forth in subpart F of this part.

(3) Each index of “(a)(2)” materials or supplement thereto shall be arranged topical or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Case name and numbering arrangements, however, may also be included for DoD Component convenience.

(4) A general index of FOIA-processed (a)(2) records referred to in § 286.7(b)(4), shall be made available to the public, both in hard copy and electronically by December 31, 1999.

(b) *Other materials.* (1) Any available index of DoD Component material published in the Federal Register, such as material required to be published by Section 552(a)(1) of the FOIA, shall be made available in DoD Component FOIA reading rooms, and electronically to the public.

(2) Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, “(a)(1)” materials shall, when feasible, be made available to the public in FOIA reading rooms for inspection and copying, and by electronic means. Examples of “(a)(1)” materials are: descriptions of any agency’s cen-

tral and field organization, and to the extent they affect the public, rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

Subpart C—Exemptions

§ 286.11 General provisions.

Records that meet the exemption criteria of the FOIA may be withheld from public disclosure and need not be published in the FEDERAL REGISTER, made available in a library reading room, or provided in response to a FOIA request.

§ 286.12 Exemptions.

The following types of records may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law: A discretionary release of a record (see also § 286.4(e)) to one requester shall prevent the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. However, a FOIA exemption may be invoked to withhold information that is similar or related that has been the subject of a discretionary release. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester’s interest. However, if the subject of the record is the requester for the record and the record is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized by DoD 5400.11–R⁴ and by a FOIA exemption.

(a) *Number 1 (5 U.S.C. 552(b)(1)).* Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations, such as DoD 5200.1–R.⁵ Although material is not classified at the time of the FOIA request, a classification review

⁴See footnote 1 to § 286.1(a).

⁵See footnote 1 to § 286.1(a).

may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1-R apply. If the information qualifies as exemption 1 information, there is no discretion regarding its release. In addition, this exemption shall be invoked when the following situations are apparent:

(1) The fact of the existence or non-existence of a record would itself reveal classified information. In this situation, Components shall neither confirm nor deny the existence or non-existence of the record being requested. A “refusal to confirm or deny” response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a “no record” response when a record does not exist, and a “refusal to confirm or deny” when a record does exist will itself disclose national security information.

(2) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals additional association or relationship that meets the standard for classification under an existing executive order for classification and DoD 5200.1-R, and is not otherwise revealed in the individual items of information.

(b) *Number 2 (5 U.S.C. 552(b)(2))*. Those related solely to the internal personnel rules and practices of the Department of Defense or any of its Components. This exemption is entirely discretionary. This exemption has two profiles, high (b)(2) and low (b)(2). Paragraph (b)(2) of this section contains a brief discussion on the low (b)(2) profile; however, that discussion is for information purposes only. When only a minimum Government interest would be affected (administrative burden), there is a great potential for discretionary disclosure of the information. Consequently, DoD Components shall not invoke the low (b)(2) profile.

(1) Records qualifying under high (b)(2) are those containing or constituting statutes, rules, regulations, orders, manuals, directives, instructions, and security classification guides, the release of which would allow circumvention of these records thereby

substantially hindering the effective performance of a significant function of the Department of Defense. Examples include:

(i) Those operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, and examiners that must remain privileged in order for the DoD Component to fulfill a legal requirement.

(ii) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

(iii) Computer software, the release of which would allow circumvention of a statute or DoD rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be closely examined to ensure a circumvention possibility exists.

(2) Records qualifying under the low (b)(2) profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include rules of personnel’s use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings. DoD Components shall not invoke the low (b)(2) profile.

(c) *Number 3 (5 U.S.C. 552(b)(3))*. Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. The Directorate for Freedom of Information and Security Review maintains a list of (b)(3) statutes used within the Department of Defense, and provides updated lists of these statutes to DoD Components on a periodic basis. A few examples of such statutes are:

(1) *Patent Secrecy*, 35 U.S.C. 181–188. Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

(2) Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162.

(3) Communication Intelligence, 18 U.S.C. 798.

(4) Authority to Withhold From Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoD Directive 5230.25.⁶

(5) Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants, 10 U.S.C. 1102f.

(6) Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 U.S.C. 128.

(7) Protection of Intelligence Sources and Methods, 50 U.S.C. 403–3(c)(6).

(8) Protection of Contractor Submitted Proposals, 10 U.S.C. 2305(g).

(9) Procurement Integrity, 41 U.S.C. 423.

(d) *Number 4 (5 U.S.C. 552(b)(4))*. Those containing trade secrets or commercial or financial information that a DoD Component receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. Commercial or financial information submitted on a voluntary basis, absent any exercised authority prescribing criteria for submission is protected without any requirement to show competitive harm (see paragraph (d)(8) of this section). If the information qualifies as exemption 4 information, there is no discretion in its release. Examples include:

(1) Commercial or financial information received in confidence in connection

with loans, bids, contracts, or proposals set forth in or incorporated by reference in a contract entered into between the DoD Component and the offeror that submitted the proposal, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. See also § 286.23(h)(2) of this part. Additionally, when the provisions of 10 U.S.C. 2305(g), and 41 U.S.C. 423 are met, certain proprietary and source selection information may be withheld under exemption 3.

(2) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(3) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(4) Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

(5) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(6) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320–2321 and DoD Federal Acquisition Regulation Supplement (DFARS), Chapter 2 of 48 CFR, Subpart 227.71–227.72. Technical data developed exclusively with Federal funds may be withheld under Exemption Number 3 if it meets the criteria of 10 U.S.C. 130 and

⁶See footnote 1 to § 286.1(a).

DoD Directive 5230.25 (see paragraph (c)(4) of this section).

(7) Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

(8) Proprietary information submitted strictly on a voluntary basis, absent any exercised authority prescribing criteria for submission. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Submission of information under these authorities is not voluntary. (See also §286.23(h)(3).)

(e) *Number 5 (5 U.S.C. 552(b)(5))*. Those containing information considered privileged in litigation, primarily under the deliberative process privilege. Except as provided in paragraphs (e)(2) through (e)(5) of this section, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in deliberative records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 U.S.C. 552(e)), or within or among DoD Components. In order to meet the test of this exemption, the record must be both deliberative in nature, as well as part of a decision-making process. Merely being an internal record is insufficient basis for withholding under this exemption. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege. This exemption is entirely discretionary.

(1) Examples of the deliberative process include:

(i) The non factual portions of staff papers, to include after-action reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions.

(ii) Advice, suggestions, or evaluations prepared on behalf of the Department of Defense by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose

of obtaining advice and recommendations.

(iii) Those non factual portions of evaluations by DoD Component personnel of contractors and their products.

(iv) Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(v) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest.

(vi) Those portions of official reports of inspection, reports of the Inspector General, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(vii) Planning, programming, and budgetary information that is involved in the defense planning and resource allocation process.

(2) If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the Agency, then it should not be withheld under the FOIA. If, however, the information hypothetically would not be released at all, or would only be released in a particular case during civil discovery where a party's particularized showing of need might override a privilege, then the record may be withheld. Discovery is the formal process by which litigants obtain information from each other for use in the litigation. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

(3) Intra- or inter-agency memoranda or letters that are factual, or those

reasonably segregable portions that are factual, are routinely made available through discovery, and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(4) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(5) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

(f) *Number 6 (5 U.S.C. 552(b)(6))*. Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person about whom the information is about, would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. If the information qualifies as exemption 6 information, there is no discretion in its release.

(1) Examples of other files containing personal information similar to that contained in personnel and medical files include:

(i) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(ii) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(2) Home addresses, including private e-mail addresses, are normally not releasable without the consent of the individuals concerned. This includes lists of home addresses and military quarters' addresses without the occupant's name. Additionally, the names and duty addresses (postal and/or e-mail) of DoD military and civilian personnel who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(i) *Privacy interest*. A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(ii) Names and duty addresses (postal and/or e-mail) published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

(3) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if disclosure is in the public interest. Additionally, the deceased's social security number should be withheld since it is used by the next of kin to receive benefits. Disclosures may be made to

the immediate next of kin as defined in DoD Directive 5154.24.⁷

(4) A clearly unwarranted invasion of the privacy of third parties identified in a personnel, medical or similar record constitutes a basis for deleting those reasonably segregable portions of that record. When withholding third party personal information from the subject of the record and the record is contained in a Privacy Act system of records, consult with legal counsel.

(5) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, DoD Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption 6 must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components shall coordinate with other DoD Components or Federal Agencies before referring a record that is exempt under the Glomar concept.

(i) A “refusal to confirm or deny” response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a “no records” response when a record does not exist and a “refusal to confirm or deny” when a record does exist will itself disclose personally private information.

(ii) Refusal to confirm or deny should not be used when:

(A) The person whose personal privacy is in jeopardy has provided the requester a waiver of his or her privacy rights.

(B) The person initiated or directly participated in an investigation that lead to the creation of any agency record seeks access to that record.

(C) The person whose personal privacy is in jeopardy is deceased, the Agency is aware of that fact, and disclosure would not invade the privacy of the deceased’s family. See paragraph (f)(3) of this section.

(g) *Number 7 (5 U.S.C. 552(b)(7))*. Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of Executive orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes. With the exception of parts (C) and (F) (see paragraph (g)(1)(iii) of this section) of this exemption, this exemption is discretionary. If information qualifies as exemption (7)(C) or (7)(F) (see paragraph (g)(1)(iii) of this section) information, there is no discretion in its release.

(1) This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

(i) Could reasonably be expected to interfere with enforcement proceedings (5 U.S.C. 552(b)(7)(A)).

(ii) Would deprive a person of the right to a fair trial or to an impartial adjudication (5 U.S.C. 552(b)(7)(B)).

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record (5 U.S.C. 552(b)(7)(C)).

(A) this exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This a Glomar response, and exemption (7)(C) must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components shall coordinate with other DoD Components or Federal Agencies before referring a record that is exempt under the Glomar concept.

(B) A “refusal to confirm or deny” response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a “no records” response when a record does not exist and a “refusal to confirm or

⁷ See footnote 1 to § 286.1(a).

deny'' when a record does exist will itself disclose personally private information.

(C) Refusal to confirm or deny should not be used when:

(1) The person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights.

(2) The person whose personal privacy is in jeopardy is deceased, and the Agency is aware of that fact.

(D) Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of Defense; a State, local, or foreign agency or authority; or any private institution that furnishes the information on a confidential basis; and could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation (5 U.S.C. 552(b)(7)(D)).

(E) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law (5 U.S.C. 552(b)(7)(E)).

(F) Could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F)).

(2) Some examples of exemption 7 are:

(i) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related Government litigation or adjudicative proceedings.

(ii) The identify of firms or individuals being investigated for alleged irregularities involving contracting with the Department of Defense when no indictment has been obtained nor any civil action filed against them by the United States.

(iii) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized

agency or office with a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(3) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500) is not diminished.

(4) *Exclusions.* Excluded from exemption 7 are the following two situations applicable to the Department of Defense. (Components considering invoking an exclusion should first consult with the Department of Justice, Office of Information and Privacy.):

(i) Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, Components may, during only such times as that circumstances continues, treat the records of information as not subject to the FOIA. In such situation, the response to the requester will state that no records were found.

(ii) Whenever informant records maintained by a criminal law enforcement organization within a DoD Component under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the Component may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to 5 U.S.C. 552(b)(7), the response to the request will state that no records were found.

(h) *Number 8 (U.S.C. 552 (b)(8)).* Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

(i) *Number 9 (5 U.S.C. 552(b)(9)).* Those containing geological and geophysical

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information and data (including maps) concerning wells.

Subpart D—For Official Use Only

§ 286.15 General provisions.

(a) *General.* Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public because disclosure would cause a foreseeable harm to an interest protected by one or more FOIA exemptions 2 through 9 (see subpart C of this part) shall be considered as being for official use only (FOUO). No other material shall be considered FOUO, and FOUO is not authorized as an anemic form of classification to protect national security interests. Additional information on FOUO and other controlled, unclassified information may be found in DoD 5200.1-R or by contacting the Directorate for Security, Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence).

(b) *Prior FOUO application.* The prior application of FOUO markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it shall be evaluated to determine whether disclosure would result in a foreseeable harm to an interest protected by one or more FOIA exemptions 2 through 9. Even if any exemptions apply, the record shall be released as a discretionary matter when it is determined that there is no foreseeable harm to an interest protected by the exemptions.

(c) *Historical papers.* Records such as notes, working papers, and drafts retained as historical evidence of DoD Component actions enjoy no special apart from the exemptions under the FOIA.

(d) *Time to mark records.* The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

(e) *Distribution statement.* Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24⁸ shall bear that statement and may be marked FOUO, as appropriate.

§ 286.16 Markings.

(a) *Location of markings.* (1) An unclassified document containing FOUO information shall be marked “For Official Use Only” at the bottom on the outside of the front cover (if any), on each page containing FOUO information, and on the outside of the back cover (if any). Each paragraph containing FOUO information shall be marked as such.

(2) Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page. Individual paragraphs shall be marked at the appropriate classification level, as well as unclassified or FOUO, as appropriate.

(3) Within a classified document, an individual page that contains FOUO information but no classified information shall be marked “For Official Use Only” at the top and bottom of the page, as well as each paragraph that contains FOUO information.

(4) Other records, such as photographs, films, tapes, or slides, shall be marked “For Official Use Only” or “FOUO” in a manner that ensures that a recipient or viewer is aware of the status of the information therein.

(5) FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information
EXEMPT FROM MANDATORY DISCLOSURE
under the FOIA. Exemption(s) _____ applies/
apply.

(b) [Reserved]

⁸See footnote 1 to § 286.1(a).